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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a rail or air carrier that has historically enforced a safety rule prohibiting employee drug and alcohol abuse can implement more effective detection measures without precipitating a "major dispute" subject to the lengthy dispute resolution procedures of the Railway Labor Act.

2. Whether the right to implement a drug testing program is an implied in law term of a railroad collective bargaining agreement.

PARTIES TO THE PROCEEDINGS BELOW AND RULE 28.1 STATEMENT

All parties to the proceeding below are identified in the caption of this petition.

Petitioner's parent company is Burlington Northern, Inc. The partially owned subsidiaries and affiliates of petitioner and petitioner's parent are:

- The Belt Railway Company of Chicago
- Butte Pipe Line Company
- Camas Prairie Railroad Company
- CBR Distribution Corporation
- Davenport, Rock Island and North Western Railway Company
- The Denver Union Terminal Railway Company
- El Paso Natural Gas Company
  - BEM Holding Corporation
  - El Paso Development Company
    - Ex-Mission Ranches, Inc.
    - Windjammer, Inc.
  - El Paso Gas Marketing Company
  - El Paso Hydrocarbons Company
    - El Paso Frontera Corporation
    - El Paso Gas Transportation Company
    - El Paso Storage Company
      - West Lake Natural Gasoline Company
    - Odessa Natural Gasoline Company
    - Odessa Pipeline Company
    - Pecos Company
  - El Paso Mojave Pipeline Company
  - El Paso Natural Gas Clearinghouse Company
  - El Paso Production Company
- Houston Belt & Terminal Railway Company
- Iowa Transfer Railway Company
- Kansas City Terminal Railway Company
- Keokuk Union Depot Company
- Longview Switching Company
- M T Properties, Inc.

National Exchange, Inc.
    National Exchange Satellite, Inc.
New Mexico and Arizona Land Company
    NZ Development Corporation
    NZ Properties, Inc.
Paducah & Illinois Railroad Company
Portal Pipe Line Company
    Portal II Company
Portland Terminal Railroad Company
Terminal Railroad Association of St. Louis
Trailer Train Company
The Wichita Union Terminal Railway Company

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS BELOW	ii
TABLE OF AUTHORITIES	vii
OPINIONS BELOW	1
JURISDICTION	1
STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
I. RAILWAY LABOR ACT DISPUTE RESOLUTION	3
II. THE BN DRUG DETECTION PROGRAMS	5
III. THE DECISIONS OF THE COURTS BELOW	10
REASONS FOR GRANTING THE WRIT	13
I. REVIEW BY THIS COURT IS NECESSARY TO RESOLVE AN INTERCIRCUIT CONFLICT ON AN ISSUE OF CRITICAL IMPORTANCE TO RAIL AND AIRLINE SAFETY	13
A. The Circuits Are in Conflict as to Whether the Implementation of More Effective Measures to Detect Drug Impairment Creates a Major Dispute	13
B. The Decision Below Threatens the Public Safety and Undermines the Pro-Arbitration Policy of the Railway Labor Act	18

TABLE OF CONTENTS—Continued

Page

II. THE NINTH CIRCUIT ERRED IN INVENTING A FEDERAL COMMON LAW PRINCIPLE OF CONTRACT CONSTRUCTION PREMISED ON THE FOURTH AMENDMENT 22

III. THE DISTINCTIVE ISSUES POSED BY PRIVATE SECTOR DRUG TESTING PROGRAMS MERIT INDEPENDENT REVIEW BY THIS COURT 25

CONCLUSION 29

[THE APPENDIX IS SEPARATELY BOUND]

TABLE OF AUTHORITIES

CASES Page

Airline Pilots Association International v. Alaska Airlines, No. C87-353R (W.D. Wa. Aug. 11, 1987), *appeal docketed*, No. 87-4167 (9th Cir. Sept. 9, 1987) 15, 16, 22
Akron, Canton & Youngstown Railroad v. ICC, 611 F.2d 1162 (6th Cir. 1979), *cert. denied*, 449 U.S. 830 (1980) 19
Association of Western Pulp & Paper Workers v. Boise Cascade Corp., 644 F. Supp. 183 (D. Or. 1986) 25
Brotherhood of Locomotive Engineers v. Burlington Northern Railroad, 838 F.2d 1102 (9th Cir. 1988) 7
Brotherhood of Maintenance of Way Employees v. Burlington Northern Railroad, 642 F. Supp. 41 (N.D. Iowa 1985), *aff'd in part and rev'd in part*, 802 F.2d 1016 (8th Cir. 1986) 9
Brotherhood of Maintenance of Way Employees v. Burlington Northern Railroad, 802 F.2d 1016 (8th Cir. 1986) 2, 9, 10, 13, 14, 17
Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co., 394 U.S. 369 (1969) 3, 4
Brotherhood of Railway & Steamship Clerks v. Florida East Coast Railway, 384 U.S. 238 (1966) 3
Brotherhood of Railway Carmen v. Norfolk & Western Railway, 745 F.2d 370 (6th Cir. 1984) .. 4
Brotherhood of Railway Carmen v. Pacific Fruit Express Co., 651 F.2d 651 (9th Cir. 1981) 4
Consolidated Rail Corp. v. ICC, 646 F.2d 642 (D.C. Cir.), *cert. denied*, 454 U.S. 1047 (1981) 19
Detroit & Toledo Shore Line Railroad v. United Transportation Union, 396 U.S. 142 (1969) 3, 4
Division 241 Amalgamated Transit Union v. Suscy, 538 F.2d 1264 (7th Cir. 1976) 24
Elgin, Joliet & Eastern Railway v. Burley, 325 U.S. 711 (1944) 3, 4
Greco v. Halliburton Co., 674 F. Supp. 1447 (D. Wyo. 1987) 23

TABLE OF AUTHORITIES—Continued

Page

International Association of Machinists & Aerospace Workers v. Trans World Airlines, 663 F. Supp. 230 (D.D.C. 1987) 15, 22
International Association of Machinists, District 146 v. Frontier Airlines, 664 F.2d 538 (5th Cir. 1981) 5
International Association of Machinists & Aerospace Workers, Lodge 19 v. Southern Pacific Transportation Co., 105 L.R.R.M. 2046 (E.D. Cal. 1980) 15, 22
International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers v. Southwest Airlines Co., No. CA3-86-3103-R (N.D. Tex. Jan. 9, 1987), *appeal docketed*, No. 87-1085 (5th Cir. Jan. 30, 1987) 14
Jones v. McKenzie, 833 F.2d 335 (D.C. Cir. 1987) ... 24
Maine Central Railroad v. United Transportation Union, 787 F.2d 780 (1st Cir.), *cert. denied*, 107 S. Ct. 169 (1986) 4
Monroe v. Consolidated Freightways, Inc., 654 F. Supp. 661 (E.D. Mo. 1987) 23
National Railway Labor Conference v. International Association of Machinists & Aerospace Workers, 830 F.2d 741 (7th Cir. 1987) 4
National Treasury Employees Union v. Von Raab, 816 F.2d 170 (5th Cir. 1987), *cert. granted*, 56 U.S.L.W. 3590 (U.S. Mar. 1, 1988) (No. 86-1879) 26, 27, 28
Order of Railway Conductors v. Pitney, 326 U.S. 561 (1946) 4
Piedmont Aviation v. Airline Pilots Association, International, 416 F.2d 633 (4th Cir. 1969), *cert. denied*, 397 U.S. 926 (1970) 4
Railway Labor Executives Association v. Norfolk & Western Railway, 833 F.2d 700 (7th Cir. 1987) 5, 17, 24
Railway Labor Executives' Association v. Burnley, 839 F.2d 575 (9th Cir. 1988), *pet. for cert. filed*, No. 87-1555 (Mar. 17, 1988) 12, 24, 26, 28

TABLE OF AUTHORITIES—Continued

Page

REA Express, Inc. v. Brotherhood of Railway, Airline & Steamship Clerks, 459 F.2d 226 (5th Cir.), *cert. denied*, 409 U.S. 892 (1972) 4
Rutland Railway v. Brotherhood of Locomotive Engineers, 307 F.2d 21 (2d Cir. 1962), *cert. denied*, 372 U.S. 954 (1963) 4
Sanders v. Washington Metropolitan Area Transit Authority, 652 F. Supp. 765 (D.D.C. 1986) 24
Satterfield v. Lockheed Missiles & Space Co., 617 F. Supp. 1359 (D.S.C. 1985) 25
Switchmen's Union v. Southern Pacific Co., 398 F.2d 443 (9th Cir. 1968) 4
Texas Employment Commission v. Hughes Drilling Fluids, 45 Empl. Prac. Dec. (CCH) ¶ 37,751 (Tex. Ct. App. 1988) 25
Transportation Workers Union v. Southern Pennsylvania Transportation Authority, 127 L.R.R.M. 2835 (E.D. Pa. 1988), *appeal docketed*, No. 88-1117 (3d Cir. Feb. 18, 1988) .....
United Paperworkers International Union v. Misco, Inc., 108 S. Ct. 364 (1987) 21
United States v. Jacobsen, 466 U.S. 109 (1984) 23

STATUTES

Aviation Safety and Noise Abatement Act of 1979, 49 U.S.C. Appendix §§ 2101 *et seq.* (1982) 20
Boiler Inspection Act, 45 U.S.C. §§ 22, 23, 28 *et seq.* (1982) 20
Federal Aviation Act of 1958, 49 U.S.C. Appendix §§ 1302, 1389(c), 1421 20
Federal Employers' Liability Act, 45 U.S.C. §§ 51 *et seq.* (1982) 16
Federal Railroad Safety Act of 1970, 45 U.S.C. §§ 421, 431 *et seq.* (1982) 16, 20
Hours of Service Act, 45 U.S.C. § 62 (1982) 20
Railway Labor Act, 45 U.S.C. §§ 151-88 (1982) ..... *passim*
Staggers Rail Act of 1980, 49 U.S.C. § 10101a (1982) 16

TABLE OF AUTHORITIES—Continued

MISCELLANEOUS	Page
California Cedar Products Co., 123 L.R.R.M. 1335 (1986)	9
United Transportation Union v. Richmond, Fredericksburg & Potomac Railroad, Pub. L. Board No. 1775 (1976)	9
50 Fed. Reg. 31,508 (1985)	18
53 Fed. Reg. 8368 (1988)	19
Developments in Drug and Alcohol Testing, 1988: Stenographic Transcript of Hearings on S. 1041 Before the Commission on Commerce, Science and Transportation, 100th Cong., 2d Sess. (1988)	18
Baltimore & Ohio Railroad Company, 4th Annual Report (1830)	5

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Burlington Northern Railroad Company ("BN"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on February 11, 1988.

OPINIONS BELOW

The opinion of the court of appeals is reported at 838 F.2d 1087 and is reproduced in the Appendix ("App.") at 1a to 31a. The opinion of the United States District Court for the District of Montana is reported at 620 F. Supp. 173 and is reproduced in the Appendix at 33a to 35a.

JURISDICTION

The decision of the court of appeals was entered on February 11, 1988. On March 4, 1988, the court of appeals stayed issuance of its mandate pending the filing of this petition for certiorari. App. at 32a. The juris-

diction of this Court is invoked under 28 U.S.C. § 1254 (1) (1982).

STATUTE INVOLVED

Sections 2, 3, and 6 of the Railway Labor Act, 45 U.S.C. §§ 152, 153, and 156 (1982), are set forth in the Appendix at 54a to 73a.

STATEMENT OF THE CASE

This case calls into question the ability of rail and air carriers to deal with threats to the public safety by implementing reasonable measures to detect and deter employee drug impairment. After experiencing two major accidents in which drugs or alcohol were found to be a factor, BN initiated a compulsory program of post-accident testing, in which operating employees responsible for "human-factor" accidents—incidents caused by human rather than mechanical error—are tested for drug or alcohol use. Although the post-accident testing program was not prohibited by the collective bargaining agreement, the Ninth Circuit nevertheless enjoined the program on the ground that its implementation violated the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151-88 (1982). That decision is in direct conflict with the decision of the United States Court of Appeals for the Eighth Circuit in *Brotherhood of Maintenance of Way Employees v. Burlington Northern Railroad*, 802 F.2d 1016 (8th Cir. 1986) (App. at 36a-53a), upholding BN's ability to implement precisely the same post-accident testing program at issue here against identical arguments raised by another union.

BN has been a leader in the rail industry in seeking to prevent drug- and alcohol-related accidents. The Ninth Circuit's decision is therefore likely to inhibit, if not preclude, other rail carriers from instituting similar testing programs. Moreover, because the Railway Labor Act applies to air carriers as well as railroads, the issues presented by this case will also directly affect the use of drug testing programs by commercial airlines.

I. RAILWAY LABOR ACT DISPUTE RESOLUTION

Rail and air carrier labor relations are governed by the Railway Labor Act. Under the RLA, the specific procedures for resolving labor disputes depend upon whether the dispute is classified as "major" or "minor." A major dispute is one "relat[ing] to disputes over the formation of collective agreements or efforts to secure them." *Elgin, Joliet & Eastern Railway v. Burley*, 325 U.S. 711, 723 (1944). Minor disputes, on the other hand, involve the interpretation or application of an existing agreement, *id.*, which may include not only express terms but also terms implied by past practice. *Detroit & Toledo Shore Line Railroad v. United Transportation Union*, 396 U.S. 142, 153-54 (1969). A minor dispute thus

> contemplates the existence of a collective agreement already concluded or, . . . a situation in which no effort is made to bring about a formal change in terms or to create a new one. . . . In either case the claim is to rights accrued, not merely to have new ones created for the future.

Elgin, Joliet & Eastern Railway, 325 U.S. at 723.

For a major dispute, "the procedures of the Act are purposely long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute." *Brotherhood of Railway & Steamship Clerks v. Florida East Coast Railway*, 384 U.S. 238, 246 (1966). The prescribed steps include advance written notice of the proposed change, voluntary conferences, mediation under the jurisdiction of the National Mediation Board, voluntary binding arbitration, and, finally, formation of an emergency board to investigate and report on the dispute. *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969); 45 U.S.C. §§ 155-58, 160 (1982). While this lengthy process is ongoing, neither party may unilaterally alter the "actual, objective work-

ing conditions out of which the dispute arose." *Detroit & Toledo Shore Line Railroad*, 396 U.S. at 153; *see also Jacksonville Terminal Co.*, 394 U.S. at 378.

The procedures for settling minor disputes are much simpler and shorter. *See Elgin, Joliet & Eastern Railway*, 325 U.S. at 727-28. Minor disputes are referred to binding arbitration under the auspices of the National Railroad Adjustment Board ("NRAB"), and may not be the subject of strikes. *Id.* at 726.

In creating the NRAB as "an agency peculiarly competent" to resolve rail employment disputes, Congress "intended to leave a minimum responsibility to the courts." *Order of Railway Conductors v. Pitney*, 326 U.S. 561, 566 (1946). A court's responsibility extends solely to determining whether the dispute is minor, and a carrier's burden to satisfy that standard is minimal. Thus, a dispute is minor so long as the parties' interpretations of the agreement are even "arguable," [1] or if the claims are not "frivolous" or "obviously insubstantial." [2] Once this threshold standard is met and the dispute is deemed minor, the court's jurisdiction is ended; only the NRAB is empowered to interpret the agreement and resolve the underlying dispute between the parties.[3]

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[1] *See, e.g., Maine Central Railroad v. United Transportation Union*, 787 F.2d 780, 782 (1st Cir.), *cert. denied*, 107 S. Ct. 169 (1986); *REA Express Inc. v. Brotherhood of Railway, Airline & Steamship Clerks*, 459 F.2d 226, 231 (5th Cir.), *cert. denied*, 409 U.S. 892 (1972); *Switchmen's Union v. Southern Pacific Co.*, 398 F.2d 443, 447 (9th Cir. 1968).

[2] *See, e.g., National Railway Labor Conference v. International Association of Machinists & Aerospace Workers*, 830 F.2d 741, 746 (7th Cir. 1987); *Brotherhood of Railway Carmen v. Norfolk & Western Railway*, 745 F.2d 370, 375 (6th Cir. 1984).

[3] *See, e.g., Maine Central Railroad*, 787 F.2d at 782; *Brotherhood of Railway Carmen v. Pacific Fruit Express Co.*, 651 F.2d 651, 652-53 (9th Cir. 1981); *Piedmont Aviation v. Airline Pilots Association, International*, 416 F.2d 633, 639 (4th Cir. 1969), *cert. denied*, 397 U.S. 926 (1970); *Rutland Railway v. Brotherhood of Locomotive Engineers*, 307 F.2d 21, 33 (2d Cir. 1962), *cert. denied*, 372 U.S. 954 (1963).

In contrast to major disputes, in a minor dispute the employer can act consistently with its interpretation of the contract pending the outcome of arbitration. *Railway Labor Executives Association v. Norfolk & Western Railway*, 833 F.2d 700, 708 (7th Cir. 1987); *International Association of Machinists, District 146 v. Frontier Airlines*, 664 F.2d 538, 542 (5th Cir. 1981).

II. THE BN DRUG DETECTION PROGRAMS

BN has historically enforced a safety rule—known as "Rule G"—that prohibits the use or possession of intoxicating substances by BN employees. In its present form, Rule G provides:

> The use of alcoholic beverages, intoxicants, narcotics, marijuana or other controlled substances by employees subject to duty, or their possession or use while on duty or on company property is prohibited. Employees must not report for duty under the influence of any marijuana or other controlled substances or medication, including those prescribed by a doctor, that may in any way adversely affect their alertness, coordination, reaction, response or safety.[4]

Rule G governs employees represented by all of the sixteen unions recognized by BN. Those unions, including respondent, the Brotherhood of Locomotive Engineers ("BLE"), concede that enforcement of Rule G is necessary to employee and public safety.[5] In fact, prior to this litigation BLE had never challenged Rule G or the means used to detect Rule G violations.

Rule G, which dates from the early 19th century,[6] is in effect on all of the Nation's railroads. The initial ver-

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[4] Joint Stipulation of Facts (filed March 7, 1985) at ¶ 3 (hereinafter "Joint Stipulation"), App. at 74a-75a.

[5] Transcript of district court hearing held March 21, 1985 at 53 (hereinafter "Tr.").

[6] *See* Baltimore & Ohio Railroad Company, 4th Annual Report (1830) (setting forth prohibition against use of "Ardent Spirits"). Rule G has been amended by the industry several times over

sion of the Rule prohibited the use or possession of alcohol by rail employees while on duty or on company property, as well as reporting for duty under the influence of alcohol. Because the Rule was originally directed to alcohol abuse, sensory perception was a reasonably adequate means of identifying most violations. BN consequently instructed supervisory personnel to observe employees' gait and speech and to note such characteristics as bloodshot eyes and the smell of alcohol on the breath.

By the 1970's, drug abuse had become more common among rail employees, and it joined alcohol as a major threat to rail safety. Tr. at 74. In an effort to deter drug use and prevent drug-related accidents, BN took two steps. In 1978, recognizing that sensory perception adequate to detect alcohol use is ineffective with respect to drugs,[7] BN instituted a program of requiring urine, blood, and breath testing following major human-factor accidents.[8] In addition, BN rewrote Rule G to make explicit the prohibition against use of "marijuana or other controlled substances." From January 1981 through March 1984, approximately 100 BN employees were subjected to discipline as a result of post-accident drug tests, including thirteen locomotive engineers.[9]

Although BLE filed "hundreds" of grievances involving individual employees against whom Rule G had been enforced, it registered no general objection to these testing practices and never challenged BN's right to enforce the modified version of Rule G. Tr. at 86. In particular, BLE never invoked the RLA procedures for requiring negotiation on the issue. *Id.* at 50, 63.

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the years to modernize its language and to make clear that it reaches drugs as well as alcohol.

[7] Tr. at 73-74. Indeed, BLE officers have conceded the inability of supervisors to determine employee drug impairment on the basis of visual observation. *Id.* at 52.

[8] Affidavit of Charles J. Bryan, App. at 83a; Tr. at 82.

[9] App. at 83a. Numerous other BN employees were tested following accidents and showed no evidence of drug or alcohol use. *Id.*

BN's institution of employee testing following major accidents unfortunately did not stem the growing problem of employee substance abuse. On April 15, 1984, two BN trains collided near Wiggins, Colorado, killing five employees and causing $2 million in property damage. The National Transportation Safety Board ("NTSB") found that alcohol use by an engineer was a possible cause of that accident. Only six days later, an engineer and a head brakeman operating a train near Newcastle, Wyoming disobeyed a slow signal and an absolute stop signal and crashed into a standing train. Two BN employees died and property damage totalling $1 million resulted. The NTSB determined that use of marijuana was implicated in that accident.[10] Concerned that even its major accident testing procedures had failed to prevent these serious accidents—and aware that their consequences could have been even more serious had Amtrak trains or hazardous cargoes been involved—BN took immediate steps to strengthen Rule G enforcement.[11]

The intensified testing program that BN implemented in November 1984 requires compulsory urinalysis in three instances: (1) when a BN supervisory official determines that an employee is displaying abnormal behavior; (2) when a major human-factor accident occurs; and (3) when a minor human-factor accident occurs.[12] However,

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[10] *Abuse of Drugs, Alcohol Seen as Factors in Train Wrecks,* Washington Post, April 26, 1984, at A1.

[11] One of those steps was expanded use of canine inspection teams, which had previously been used to detect drugs in regions with high numbers of accidents or safety rule violations. Tr. at 76. In separate litigation, also initiated by BLE, the Ninth Circuit enjoined BN's canine inspection program. *Brotherhood of Locomotive Engineers v. Burlington Northern Railroad,* 838 F.2d 1102 (9th Cir. 1988).

[12] Major human-factor accidents include "major collisions involving more than one train or one switching movement." Memorandum from Charles J. Bryan, App. at 99a. Minor human-factor accidents include "derailments in yard or industry switching, failures to respond to signals, running through switches or derailments, and failures to secure." *Id.*

testing is required only if there is a causal connection between the accident and the employee's responsibilities, and testing is not required if the cause of the accident is limited to factors other than employee error.[13]

This amplified post-accident testing program was implemented in each of the twenty-nine states and two Canadian provinces in which BN operates. During its first four months, the intensified program yielded a decrease of 32 percent in human-factor accidents and 55 percent in accident-related expenses.[14]

Although the BLE General Chairman voiced objections to BN officials with respect to the intensified drug detection program, BLE did not demand collective bargaining on it.[15] BN engaged in informal discussion of the issue in an effort to allay BLE's concerns, offering to cooperate with the union in resolving any individual problems in the program's application or, if necessary, to submit the program to expedited arbitration.[16] When BLE refused to continue the informal discussion process, BN submitted the issue for binding arbitration as a "minor dispute" under the RLA.[17] That arbitration, which was filed by

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[13] Joint Stipulation at ¶ 20, App. at 77a-78a. The intensified post-accident testing program is designed to permit investigation only when supervisory personnel have a reasonable suspicion that an employee is impaired by drug or alcohol use. Testing is limited to the crew directly responsible for the accident, or to the responsible individual within the crew, and the tests are conducted at medical facilities under the least intrusive circumstances possible. App. at 99a. BLE has raised no issue in this case as to the manner in which the tests are conducted or the acceptability of test results.

[14] Of the 329 BN employees designated for testing during that period, nearly twenty percent either tested positive or refused to be tested. App. at 83a.

[15] Affidavit of James B. Dagnon, App. at 94a-95a.

[16] *Id.*; Joint Stipulation at ¶ 19, App. at 77a.

[17] App. at 96a; Joint Stipulation at ¶ 28, App. at 79a-80a. The arbitrators thus would have jurisdiction to decide the merits of the issue, including whether BN could impose the drug testing program

BN on February 6, 1985, is pending before an NRAB arbitration panel.

After the arbitration was filed, this same post-accident testing program was challenged by the Brotherhood of Maintenance of Way Employees.[18] Like the BLE here, that union contended that BN's institution of the amplified post-accident testing program created a major dispute. 642 F. Supp. at 43. The district court rejected the union's claim, holding that

> the testing challenged by the Union is "arguably justified" under the terms of the agreement now existing between the parties. Furthermore, the Court finds that the implied contractual agreement between the parties, as it relates to the enforcement of Rule G, is "reasonably susceptible" to the interpretations sought by both the carrier and the union. As a result, the Court finds the present controversy of post-incident testing to be a "minor" dispute within the meaning of the RLA.

Id. at 47 (footnote omitted).

The Eighth Circuit affirmed, holding that a dispute must be classified as minor if the agreement is "reasonably susceptible" of the interpretations sought by both the employer and the employees and that the record clearly sustained the trial court's finding that BN's in-

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unilaterally as a matter of management prerogative. *See, e.g., United Transportation Union v. Richmond, Fredericksburg & Potomac Railroad*, Pub. L. Board No. 1775 (1976); *compare California Cedar Products Co.*, 123 L.R.R.M. 1355 (1986).

[18] *See Brotherhood of Maintenance of Way Employees v. Burlington Northern Railroad*, 642 F. Supp. 41 (N.D. Iowa 1985), *aff'd in part and rev'd in part*, 802 F.2d 1016 (8th Cir. 1986). The union in that case also challenged BN's incorporation of drug testing into its longstanding requirement that job applicants and employees returning to work after furlough undergo physical examinations, including urinalysis, and that employees have periodic physical examinations. The Eighth Circuit also held that these issues constituted minor disputes. 802 F.2d at 1024, App. at 51a-52a.

terpretation of the agreement was plausible. 802 F.2d at 1022, App. at 47a. It emphasized that the union had acquiesced in BN's imposition of Rule G and enforcement of the Rule through sensory perception, and that "[w]hat the railroad has done now is to add a more refined step, the urine test, to confirm the observation of the supervisor." 802 F.2d at 1023, App. at 50a. The Eighth Circuit therefore refused to enjoin the program.

III. THE DECISIONS OF THE COURTS BELOW

Despite the pendency of the arbitration at the NRAB, BLE filed this action, seeking a declaration that BN's implementation of the post-accident drug testing program violated the Railway Labor Act and "the rights of its employees represented by BLE to privacy and against unreasonable searches and seizures." Complaint at ¶ A (filed Feb. 20, 1985). BLE also requested injunctive relief. Complaint at ¶ C. Although BLE had never challenged Rule G or any detection method, including urinalysis following major human-factor accidents, the union claimed that BN had no right under the collective bargaining agreement to use urinalysis tests to detect drug-related Rule G violations in cases of minor human factor accidents or safety rule violations.

BN sought dismissal of the complaint on the ground that the NRAB had exclusive jurisdiction over the dispute. After submission of affidavits and an evidentiary hearing at which witnesses for both BLE and BN testified, the district court granted summary judgment to BN. App. at 35a.

The district court squarely rejected BLE's claim that implementation of the post-accident drug testing program constituted a major dispute as to which BN was compelled to negotiate. The court held that the parties had implicitly agreed that BN could investigate violations of Rule G:

> The critical term of that agreement . . . is the term requiring the existence of a modicum of evidence that

> a particular employee was operating under the influence of a prohibited substance, before a supervisor would conduct further investigation. . . . BN subjects an employee to urinalysis when that employee is believed to have been involved in an operating rule violation. . . . [B]ased upon the pleadings and evidence of record in this matter, the court concludes the urinalysis practice challenged by the Brotherhood is "arguably justified" under the terms of the agreement extant between the Brotherhood and the BN. Consequently, the court finds the present controversy to be a "minor" dispute within the meaning of the RLA.

Id.

In a divided opinion, the Ninth Circuit reversed the district court and remanded for issuance of a permanent injunction prohibiting testing of BLE members. The majority acknowledged that the district court had "accurately summarized" the standard for distinguishing between major and minor disputes as "whether the railroad's actions are 'arguably justified' by the collective agreement between BN and the BLE." *Id.* at 8a (emphasis deleted). It also acknowledged that it was bound by the district court's factual findings unless they were clearly erroneous, and agreed that BN's enforcement of Rule G "does not fall within the scope of any *express* provision of the collective agreement." *Id.* at 4a, 9a.

However, the Ninth Circuit majority rejected the trial court's findings as to the parties' past practices and the implied terms of the agreement. Without citing any evidence of record, it found there had been acquiescence only in techniques for enforcement of Rule G that were "nonintrusive," involving no greater interference with employee privacy than that caused by sensory perception of drug and alcohol impairment. *Id.* at 11a-12a. The majority reached this finding "by reference to fourth amendment doctrine," holding that BLE would not have "implicitly granted BN the authority to invade [its members'] privacy in ways the government could not" under

the Fourth Amendment.[19] The Ninth Circuit consequently ruled that BN's interpretation of the agreement was not arguably justified by any implied term of the collective bargaining agreement and that the dispute was therefore major.

The dissenting member of the Ninth Circuit panel concluded that the majority's decision was "critically flawed" because of its failure to apply correctly the "arguably justified" standard used by the district court and acknowledged by the majority to be the proper test. *Id.* at 13a. The dissent noted that

> [i]nstead of determining whether post-incident testing is arguably permitted by Rule G, the majority abandons the proper test and applies the Fourth Amendment to an agreement between non-governmental actors. . . .
>
> * * * *
>
> The majority's new test would make the intention of the parties irrelevant to a proper interpretation of their agreement.

Id. at 13a-14a.

After applying the "arguably justified" standard to the findings of the district court, the dissent concluded that the case presented a minor dispute, and observed that "[m]y conclusion that post-incident testing poses only a minor dispute is supported by the Eighth Circuit's recent decision in *Brotherhood of Maintenance of Way Employees*." *Id.* at 29a. The dissent was critical of the majority's failure to follow

> the Eighth Circuit's well-reasoned analysis of precisely the same issue . . . . [T]he only difference between the question presented in this matter and the

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[19] App. at 11a. The same Ninth Circuit majority ruled the same day that mandatory drug testing pursuant to regulations adopted by the Federal Railroad Administration involved an unreasonable search prohibited by the Fourth Amendment. *See Railway Labor Executives' Association v. Burnley*, 839 F.2d 575 (9th Cir. 1988), *pet. for cert. filed*, No. 87-1555 (Mar. 17, 1988).

> issue before the Eighth Circuit is the identity of the union challenging the testing program. In all other respects the facts and legal questions are identical. The majority's opinion creates an intercircuit conflict.

Id. at 13a (citation omitted).

REASONS FOR GRANTING THE WRIT

I. REVIEW BY THIS COURT IS NECESSARY TO RESOLVE AN INTERCIRCUIT CONFLICT ON AN ISSUE OF CRITICAL IMPORTANCE TO RAIL AND AIRLINE SAFETY

A. The Circuits Are in Conflict as to Whether the Implementation of More Effective Measures to Detect Drug Impairment Creates a Major Dispute

Increased concern over the safety threat caused by substance abuse has led rail and air carriers to turn to more effective measures to enforce their historic rules against alcohol and drug use by employees. But the question whether such measures can be implemented without precipitating a major dispute under the RLA has split the federal courts. The conflict is demonstrated most graphically by the contrast between the decision of the Ninth Circuit in this case, which enjoined BN's post-accident testing program, and that of the Eighth Circuit in *Brotherhood of Maintenance of Way Employees*, which upheld BN's implementation of the *same* post-accident testing program based on the *same* evidence regarding past practices.

The contrast between the reasoning of the Eighth Circuit and that of the Ninth Circuit is stark. After reviewing the evidence of the parties' past practices with respect to Rule G violations, the Eighth Circuit concluded that:

> [w]hat the railroad has done now is to add a more refined step, the urine test, to confirm the observation of the supervisor. Since the test can be required only upon some showing that the employee may be

> impaired, the ground rules between the union and the railroad have not changed significantly; suspicion of impairment is still required.

802 F.2d at 1023, App. at 50a. The Ninth Circuit, however, viewed the post-accident testing program as a marked disruption of those same ground rules:

> BN's new mandatory urine testing program is a clear change in working conditions governed by the collective agreement and, thus, by definition, a major dispute. It is a mistake to conclude that BLE impliedly agreed to the new testing program just because "through custom and practice" it had for forty years accepted enforcement of Rule G by the nonintrusive procedure of sensory surveillance.

App. at 11a-12a.

These irreconcilable appellate precedents will exacerbate the already substantial confusion among district courts on these issues. For example, a district court in the Third Circuit has recently enjoined a random drug-testing program with respect to Southeastern Pennsylvania Transportation Authority employees subject to the Railway Labor Act. Like the Ninth Circuit here, the district court reasoned that objections to that program raised a major dispute even though employees had previously acquiesced in other efforts to identify drug impairment. *Transportation Workers Union of Philadelphia v. Southeastern Pennsylvania Transportation Authority*, 127 L.R.R.M. 2835 (E.D. Pa. 1988), *appeal docketed*, No. 88-1117 (3d Cir. Feb. 18, 1988).[20]

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[20] *See also International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers v. Southwest Airlines*, No. CA3-86-3103-R (N.D. Tex. Jan. 9, 1987), *appeal docketed*, No. 87-1085 (5th Cir. Jan. 30, 1987) (App. at 121a). In that case, the union challenged as a "major dispute" a program to test employees for drugs after they were involved in vehicle or aircraft accidents. Finding that Southwest Airlines had no past practice of drug abuse investigation, the court held the dispute to be major and enjoined the program. App. at 121a, 128a. In its opinion, the court distinguished the rationale of both the Eighth Circuit's decision in

In contrast, two other district courts have refused to enjoin drug testing by airlines, rejecting union claims that a major RLA dispute was involved. In *International Association of Machinists & Aerospace Workers v. Trans World Airlines*, 663 F. Supp. 230 (D.D.C. 1987), the court relied on the Eighth Circuit's decision in dismissing challenges to enforcement of a safety rule—nearly identical in terms to Rule G—that had been implemented by the entire airline industry and that TWA previously had enforced by means of sensory perception. *Id.* at 232. The court described the progression from sensory perception to an objective testing policy as a mere "refinement of the techniques used in the past," and held that the airline's claimed contractual justification for the change was not "obviously insubstantial." *Id.* The dispute accordingly was held to be minor and TWA was permitted to implement the drug testing program pending arbitration.[21]

Similarly, in *Airline Pilots Association International v. Alaska Airlines*, No. C87-353R (W.D. Wa. Aug. 11, 1987), *appeal docketed*, No. 87-4167 (9th Cir. Sept. 9, 1987) (App. at 112a), the court refused to enjoin the airline's effort to test pilots returning to work after a

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Brotherhood of Maintenance of Way Employees and the district court's decision in this case on the ground that evidence of a past practice of investigating drug abuse violations existed in those cases. *Id.* at 129a.

[21] Another district court also has held that use of more sophisticated means of detecting alcohol impairment creates a minor dispute. *See International Association of Machinists & Aerospace Workers, Lodge 19 v. Southern Pacific Transportation Co.*, 105 L.R.R.M. 2046 (E.D. Cal. 1980). In that case the railroad, which had historically enforced Rule G by means of sensory perception, instituted random use of an "Intoxilyzer" breath analysis device to measure the concentration of alcohol in employees' blood. The court held that because the carrier's enhancement of the techniques used to detect Rule G violations was arguably authorized by the implied terms of the collective bargaining agreement, the dispute was minor. *Id.* at 2049-50.

furlough or when on-the-job behavior revealed a drug problem. Rejecting the pilots' claim that the testing program created a major dispute, the court noted that safety rules long had banned the use of drugs and alcohol by pilots as well as imposing a routine physical examination requirement. The pilots had acquiesced in these past practices regarding on-duty drug use, and the dispute was therefore minor. *Id.* at 118a.

Neither the railroads nor the public can long endure this situation, in which different safety standards are applicable in different circuits or judicial districts. All of the Nation's major railroads operate in more than one state; the twenty-nine states in which BN operates encompass seven of the federal circuits. The techniques for enforcing Rule G cannot change as trains run across the country from one state to another. This is precisely why, in enacting virtually every major piece of federal railroad legislation, Congress has emphasized the need for nationwide geographic uniformity in the handling of railroad employment issues. *See, e.g.*, 49 U.S.C. § 10101a (Staggers Rail Act of 1980); 45 U.S.C. §§ 51 *et seq.* (Federal Employers' Liability Act); 45 U.S.C. §§ 421, 431 *et seq.* (Federal Railroad Safety Act). The conflict created by the Ninth Circuit decision makes such uniformity impossible.[22]

The conflict also has the potential for creating serious practical problems in employee relations. BN's employees are represented by sixteen separate unions. Members of different unions frequently work together on the same train or on the same project. Indeed, the locomotive

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[22] The confusion engendered by such conflicting decisions also will affect the arbitrations over drug testing issues that frequently occur throughout the country. *See* Denenberg & Denenberg, *Drug Testing from the Arbitrator's Perspective*, 11 Nova L.J. 371 (1987). In resolving the merits of drug testing controversies, arbitrators will be forced to align themselves with the Eighth Circuit, the Ninth Circuit, a local district court, or, perhaps most likely, delay reaching a decision until definitive legal guidance is obtained.

crew almost always consists of a BLE member—the engineer—and one or more members of another union—a conductor, a brakeman, or a fireman. When an accident occurs BN will be able to test employees who are members of other unions, but—as a result of the conflicting decisions of the Eighth and Ninth Circuits—will be prohibited from testing any BLE members. Such a situation could well lead to the perception that the drug testing program is unfairly administered or designed to penalize a few, rather than implemented for the protection of all.

Finally, the inconsistent case law results in a set of rules that together make no sense. For example, under the current state of the law, a railroad can require *all* of its employees to undergo a urinalysis drug screen as part of a routine annual physical examination without initiating a major dispute,[23] but it cannot require such testing of BLE employees involved in a human factor accident in which people are killed, App. at 11a-12a.

This Court must act promptly to reverse the decision below and resolve the intercircuit conflict. The Ninth Circuit's decision is likely to cripple BN's efforts to protect the public against undeniably serious risks. The decision will have similar implications for other railroads and air carriers that do not have express provisions governing drug testing in their collective bargaining agreements. There is no reason to think that decisions by additional circuits will clarify the issue, although they undoubtedly will further complicate administration of any drug testing program. Given the urgency of the threat to public safety posed by employee drug use in railroad and airline operations, the question should be resolved by the Court at this time.

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[23] *See Railway Labor Executives Association v. Norfolk & Western Railway*, 833 F.2d 700, 706 (7th Cir. 1987); *Brotherhood of Maintenance of Way Employees*, 802 F.2d at 1024, App. at 51a-52a.

B. The Decision Below Threatens the Public Safety and Undermines the Pro-Arbitration Policy of the Railway Labor Act

The issue on which the Ninth and Eighth Circuits are in conflict is one of major national importance. Since January 1987 alone, there have been 41 railroad accidents in which one or more of the employees responsible for operating the train were impaired by drugs or alcohol.[24] Those accidents caused 29 deaths and more than 340 injuries, as well as over $28 million in property damage.[25]

The risks to the public from drug-impaired railroad employees propelling 150-ton locomotives over congested rail corridors have become painfully evident in recent months. Apart from the obvious threat to the health and safety of rail employees, collisions with Amtrak passenger trains[26] and derailments of trains carrying hazardous chemicals or radioactive materials[27] pose grave

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[24] *See* Developments in Drug and Alcohol Testing, 1988: Stenographic Transcript of Hearings on S. 1041 Before the Comm. on Commerce, Science and Transportation, 100th Cong., 2d Sess. at 50-51 (1988) ("Amtrak Crash Hearings") (statement of John H. Riley, Administrator, Federal Railroad Administration).

[25] *Id.* According to the Federal Railroad Administration, even these dramatic statistics are understated: "Many additional train accidents, fatalities in train incidents, and injuries in train incidents are caused by alcohol or drug impairment, but the role of alcohol or drugs escapes detection or is inadequately documented or reported." 50 Fed. Reg 31,508, 31,515-16 (1985).

[26] *See* Washington Post, Jan. 15, 1987, at A1 (engineer and brakeman involved in January 4, 1987, fatal collision of Conrail locomotive and Amtrak passenger train impaired by use of marijuana); *see also* Amtrak Crash Hearings at 82-83 (statement of Ricky L. Gates).

[27] Derailments of trains carrying hazardous chemicals can require the evacuation of thousands from their homes. *See, e.g.*, United Press Int'l, Mar. 20, 1988 (1700 persons evacuated from Annandale, Minn.); Associated Press, Dec. 13, 1987 (5000 persons evacuated from Round Rock, Tex.); Associated Press, July 22, 1987 (16,000 persons evacuated from Pittsburgh, Pa.); Associated Press,

dangers to the general public.[28]

The Ninth Circuit majority's conclusion that BN's drug testing program is subject to the major dispute procedures of the RLA means, as a practical matter, that implementation of the program will be delayed indefinitely. This result and its implications for the safety of rail and airline operations should not be lightly accepted.

The Ninth Circuit wholly failed to appreciate the context in which railroad operations are conducted and the role of safety in the railroad work environment. Railroads, unlike most private businesses, cannot limit their undertaking and are not free to avoid handling commodities—such as hazardous chemicals and radioactive materials—that present major public safety hazards.[29] Nor are they able to keep dangerous commodities away from populated areas, since they are physically confined to track systems that often traverse urban areas. The inherently dangerous nature of railroad operations is

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May 6, 1987 (1000 persons evacuated from Confluence, Pa.); United Press Int'l, Feb. 2, 1987 (200 persons evacuated from Corinth, Miss.); United Press Int'l, Jan. 6, 1987 (derailment in Callicoon, N.Y., forced evacuation of hospital and "scores of residents").

[28] Employee drug abuse has also endangered airline passengers. *See, e.g.*, N.Y. Times, Mar. 12, 1988, § 1 at 6, Col. 1 (traces of cocaine found in pilot of Continental Express commuter plane that crashed near Durango, Colorado, killing nine); L.A. Times, Nov. 15, 1987, § 1 at 22, Col. 1 (captain of jet that crashed at Dallas-Fort Worth International Airport, killing 137, had tranquilizer prescriptions filled several times in months before crash); *see also* 53 Fed. Reg. 8368, 8369 (1988) (information on drug abuse by pilots given as background to proposed Federal Aviation Administration regulations regarding drug testing); L.A. Times, Sept. 9, 1987, § 1 at 2, Col. 5 (small plane pilot arrested on suspicion of drunk flying after making several erratic approaches to airport).

[29] *See Akron, Canton & Youngstown Railroad v. ICC*, 611 F.2d 1162, 1167-68 (6th Cir. 1979) (common carrier obligation to handle spent nuclear fuel and low-level reactor wastes), *cert. denied*, 449 U.S. 830 (1980); *see also Consolidated Rail Corp. v. ICC*, 646 F.2d 642, 644 (D.C. Cir.), *cert. denied*, 454 U.S. 1047 (1981).

reflected in the array of statutes, regulations, and common law principles directed toward mandating that railroads operate in the safest possible manner.[30] It is also reflected in the detailed safety rules—including Rule G—that govern railroad employees.

In this context, it was particularly inappropriate for the Ninth Circuit to construe the parties' agreement as *precluding* the implementation of needed safety measures, such as BN's post-accident drug testing program, in the absence of express terms to that effect. If anything, the presumption should be that the parties entered into an agreement consistent with the public safety, implicitly authorizing the carrier to employ reasonable measures to detect and deter violations of previously-imposed safety rules.

Such a result was clearly supported by the record in this case. It is undisputed that Rule G expressly prohibits BN's employees from using or possessing drugs or alcohol on duty and from reporting for work in a state of drug or alcohol impairment. *See supra* at 5. It is equally undisputed that BN's collective bargaining agreement contains no express terms regarding the means of detecting drug use prohibited by the Rule. App. at 9a. Nor did the collective bargaining agreement expressly bar BN from adopting reasonable drug detection measures needed to protect the public as well as its employees' safety. Indeed, the district court found that longstanding practice between the parties permitted the railroad to determine the appropriate means of investi-

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[30] *See, e.g.*, Hours of Service Act, 45 U.S.C. § 62(a) (1982) (restricting the number of hours an employee of a common carrier may be on duty); Federal Railroad Safety Act of 1970, 45 U.S.C. §§ 421, 431 *et seq.* (1982); Boiler Inspection Act, 45 U.S.C. §§ 22, 23, 28 *et seq.* (1982); Federal Aviation Act of 1958, 49 U.S.C. Appendix § 1302 (1982) (providing that "[t]he assignment and maintenance of safety [is] the highest priority in air commerce"); *id.* at § 1389(c) (safety of air commuter carriers); *id.* at § 1421 (safety regulation of civil aeronautics); Aviation Safety and Noise Abatement Act of 1979, 49 U.S.C. Appendix § 2101 *et seq.* (1982).

gating and deterring suspected individual violations of the Rule. *Id.* at 35a. In these circumstances, the Ninth Circuit should have concluded, consistent with public safety concerns, that BN's position was at the very least an arguable interpretation of the contract and referred the case to arbitration as a minor dispute.[31]

Rather than permitting the NRAB to consider evidence of past practice, the Ninth Circuit reviewed that evidence and reached its own interpretation of the agreement, holding that any other interpretation of the contract, including one lending weight to the public interest in safety, was precluded as a matter of law.[32] This approach betrays the Ninth Circuit majority's fundamental misunderstanding of its role under the RLA. By far exceeding the "minimum responsibility" accorded it by the RLA, the court below violated the pro-arbitration policy of that Act, which grants the NRAB exclusive authority to interpret express and implied contract terms and decide the ultimate controversy between the parties. As a result, the dispute between BN and BLE was decided without benefit of the NRAB's expertise in railroad employment relationships and its familiarity with the understandings and practices previously developed in the enforcement of Rule G.

The situation presented here is far from unique. Because drug abuse has only recently emerged as a problem in the American workplace, most railroad and airline collective bargaining agreements do not explicitly

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[31] Nor would such a decision be inconsistent with *United Paperworkers International Union v. Misco, Inc.*, 108 S. Ct. 364 (1987). In *Misco*, this Court held that, given the particularly strong federal policy in favor of the arbitration process, general "public policy" concerns could not be used to overturn an arbitrator's decision. Here, BN is contending that public policy considerations are a significant factor in determining that an issue *should* be referred to arbitration.

[32] Indeed, BN submits that its implementation of new techniques to detect Rule G violations is a matter of management prerogative. *See* n.17 *supra*.

address the detection of drug impairment. However, other rail and air carriers also have a past practice of attempting to identify employees impaired by intoxicating substances, and reasonably assume they can move forward promptly with more effective techniques under their existing agreements.[33] The opinion below, holding that such an interpretation is not even plausible, stands as a barrier to the prompt implementation of needed drug screening procedures. If these vital measures are not to be put on hold pending the outcome of the lengthy major dispute process mandated by the Railway Labor Act, guidance from this Court is essential.

II. THE NINTH CIRCUIT ERRED IN INVENTING A FEDERAL COMMON LAW PRINCIPLE OF CONTRACT CONSTRUCTION PREMISED ON THE FOURTH AMENDMENT

While the Ninth Circuit majority refused to presume that concern for the public safety was an implied term of every employment agreement, it did rely upon a presumption in holding that the collective bargaining agreement could not implicitly permit post-accident testing. That presumption is that employees would *never* acquiesce in practices that the government could not impose under the Fourth Amendment—that they would never have permitted the carrier "the authority to invade their privacy in ways the government could not." App. at 11a. The court of appeals thus concluded that even when the express terms of the collective bargaining agreement do not create any expectation of privacy, it must be inferred that privacy protections equivalent to those contained in the Fourth Amendment are implicit in the agreement.

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[33] *See, e.g., International Association of Machinists & Aerospace Workers v. Trans World Airlines*, 663 F. Supp. 230 (D.D.C. 1987); *Airline Pilots Association International v. Alaska Airlines*, No. C87-353R (W.D. Wa. Aug. 11, 1987) (App. at 112a); *International Association of Machinists & Aerospace Workers, Lodge 19 v. Southern Pacific Transportation Co.*, 105 L.R.R.M. 2046 (E.D. Cal. 1980).

The Ninth Circuit holding makes no sense as a matter of law. Its undeniable effect is to make Fourth Amendment constraints indirectly applicable to private employers. However, "[t]his Court has . . . consistently construed [the Fourth Amendment] as proscribing only governmental action; it is wholly inapplicable 'to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official.'" *United States v. Jacobsen*, 466 U.S. 109, 113 (1984) (quoting *Walter v. United States*, 447 U.S. 649, 662 (1980) (Blackmun, J., dissenting)). Indeed, in reviewing employer efforts to deal with workplace drug and alcohol abuse, the lower courts—with the exception of the Ninth Circuit—have carefully distinguished between public employers, whose implementation of drug programs is clearly constrained by the Fourth Amendment, and private employers, whose efforts to develop reasonable and effective programs are not so constrained.[34]

Nor does the Ninth Circuit's freewheeling definition of employee expectations comport with the reality reflected in the record. Urinalysis (including testing for drugs) is a routine feature of pre-employment testing for all BN employees and of the physical examinations required on recall of furloughed employees. BN also requires periodic physicals of all operating employees to assure they remain fit for duty. BLE has never raised any objection to these examinations, which involve precisely the same activities the Ninth Circuit majority

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[34] *See, e.g., Greco v. Halliburton Co.*, 674 F. Supp. 1447, 1451 (D. Wyo. 1987); *Monroe v. Consolidated Freightways, Inc.*, 654 F. Supp. 661, 663 (E.D. Mo. 1987); *see also* Lehr & Middlebrooks, *Work-Place Privacy Issues and Employer Screening Policies*, 11 Empl. Rel. L.J. 407, 408 (1987); Miller, *Mandatory Urinalysis Testing and the Privacy Rights of Subject Employees: Toward a General Rule of Legality Under the Fourth Amendment*, 48 U. Pitt. L. Rev. 201, 217 (1986).

viewed as an unimaginable privacy intrusion in enjoining the post-accident testing program.[35]

The Ninth Circuit majority ignored such legal and factual considerations and—without citing either precedent or record support—established a novel principle of federal contract interpretation that would in effect extend Fourth Amendment constraints to all private employers unless their employees expressly agree to the contrary.[36] Moreover, because the court of appeals asserted this principle solely as an abstract matter of law, the Ninth Circuit decision contains no inherent limitations that would restrict application of the principle to this case, to contract relationships governed by the Rail-

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[35] A substantially similar program of including drug screen urinalyses as part of routine medical examinations was reviewed by the Seventh Circuit in *Railway Labor Executives Association v. Norfolk & Western Railway*, 833 F.2d 700, 706 (7th Cir. 1987). That court concluded that the institution of urinalysis as part of the annual physical presented at most a minor dispute. *Id.* It made no reference to the Fourth Amendment in the course of its decision.

[36] The Ninth Circuit majority also erred in assuming that BN's post-accident testing program would have violated the Fourth Amendment if it had been governmentally imposed. The majority did not provide any separate reasoning with respect to that point, but relied on its decision in *Railway Labor Executives' Association v. Burnley*, 839 F.2d 575 (9th Cir. 1988), in which it enjoined Federal Railroad Administration drug-testing regulations. App. at 12a. The Ninth Circuit's decision in *Burnley*, however, is inconsistent with several other decisions that have recognized that safety concerns justify drug testing of transportation personnel by government employers, even where there is some resulting intrusion upon privacy interests. *See, e.g., Jones v. McKenzie*, 833 F.2d 335, 340-41 (D.C. Cir. 1987); *Division 241 Amalgamated Transit Union v. Suscy*, 538 F.2d 1264, 1267 (7th Cir. 1976); *Sanders v. Washington Metropolitan Area Transit Authority*, 652 F. Supp. 765, 768 (D.D.C. 1986).

The Solicitor General has filed a petition for certiorari in No. 87-1555 challenging the Ninth Circuit's interpretation of the Fourth Amendment in *Burnley*. Reversal of *Burnley* would require reconsideration of the Ninth Circuit's rulings on both the implied in law issue (App. at 12a) and the implied in fact issue (App. at 9a-12a) presented by this petition.

way Labor Act, or even to collectively-bargained employment relationships generally.

The principle on which the Ninth Circuit relied—that absent an express agreement an employee will never be deemed to have agreed to any employer procedure that the Fourth Amendment would bar the government from imposing—has no warrant in the Constitution, the common law, or the Railway Labor Act. It does, however, have broad implications for American industry. Under the reasoning of the Ninth Circuit majority, the Fourth Amendment would in effect become an implied term of every collectively-bargained agreement and perhaps other forms of employment agreements as well.[37] This expansive new federal contract law rule would preclude employers from moving quickly to institute measures to deal with drug use in the workplace. The Ninth Circuit's unsupported invention of this far-reaching principle requires correction by this Court.

III. THE DISTINCTIVE ISSUES POSED BY PRIVATE SECTOR DRUG TESTING PROGRAMS MERIT INDEPENDENT REVIEW BY THIS COURT

The abuse of drugs and alcohol in the workplace has created a need for prompt and effective responses at every level of society. As both government authorities and private employers seek to develop programs that will address the safety hazards caused by drug and alcohol impaired workers, the courts are increasingly being called upon to

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[37] This holding of the Ninth Circuit could have broad consequences for the growing number of lawsuits in which employees have alleged that private employer drug testing violates common law privacy rights. *See, e.g., Association of Western Pulp & Paper Workers v. Boise Cascade Corp.*, 644 F. Supp. 183 (D. Or. 1986); *Satterfield v. Lockheed Missiles & Space Co.*, 617 F. Supp. 1359 (D.S.C. 1985); *Texas Employment Commission v. Hughes Drilling Fluids*, 45 Empl. Prac. Dec. (CCH) ¶ 37,751 (Tex. Ct. App. 1988); *see also* Cross & Haney, *Legal Issues Involved in Private Sector Medical Testing of Job Applicants and Employees*, 20 Ind. L. Rev. 517, 521-22 (1987); Comment, *Jar Wars: Drug Testing in the Workplace*, 23 Willamette L. Rev. 529, 581-82 (1987).

consider how these initiatives can be accommodated within existing structures of public and private relationships.

The legal issues generated by this process are evident on this Court's own docket. The Court has granted a petition for certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit in *National Treasury Employees Union v. Von Raab*, 816 F.2d 170 (5th Cir. 1987), *cert. granted*, 56 U.S.L.W. 3590 (U.S. Mar. 1, 1988) (No. 86-1879), which deals with Fourth Amendment questions posed by the United States Customs Service's drug-testing program for employees who seek promotion into certain sensitive positions. In addition, the Solicitor General has recently asked the Court to review related Fourth Amendment issues presented by the Federal Railroad Administration's drug-testing regulations in *Burnley*. The search and seizure questions on which those cases turn are undeniably important in determining how government authorities will be able to employ drug and alcohol testing. But this case raises testing issues in a distinct context that is of equal—if not greater—practical importance: the ability of private employers to deal with substance abuse in the workplace.

Employee drug use is an immediate and unavoidable concern in private industry. Private sector employers now must deal on a daily basis with drug and alcohol impaired employees, and of necessity are developing tools to protect their employees, the public, and their businesses from the consequences of drug and alcohol abuse.

The urgency of these problems and the flexible responses they require have made it impossible for private employers to rely solely upon government-sponsored programs such as those at issue in *Von Raab* and *Burnley*. The government's ability to respond is, given the procedures for rule-promulgation, necessarily slow. Private industry by contrast has the capacity to respond promptly. More important, private employers have knowledge of their own workforces and workplaces that permits them to tailor solutions to specific problems. They also have

every incentive to increase the effectiveness of their programs as new and superior technologies become available.

The program at issue in this case well illustrates these points. BN instituted drug testing in 1978 in direct response to confirmed drug use problems among its employees. When several major accidents indicated that employee drug abuse was becoming even more serious, BN was able to respond in 1984 with an amplified program crafted to address the specific problems it faced. The government, by contrast, did not even propose a drug detection program for the rail industry until 1983, and two additional years were required to promulgate final regulations. When the government's program was finally adopted, it covered only a fraction of the safety incidents covered by BN's program. *See* App. at 101a-111a. Thus, although government initiatives such as the regulations at issue in *Burnley* offer a valuable backstop to private employer action, the public cannot simply await governmental solutions to this private workplace problem.

Just as government drug-testing programs cannot be expected to address the specific practical problems faced by private employers, the legal issues raised by government programs cannot yield dispositive answers in the private context. The Fourth Amendment questions as to which the Court has granted certiorari in *Von Raab* and on which the Solicitor General has sought review of *Burnley* simply do not speak to the basic issues faced by private employers such as BN.[38] The legal context in which private employer programs must be evaluated lies

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[38] Significantly, in *Von Raab*, the Customs testing program was motivated by crime-related concerns—the pervasiveness and influence of criminal organizations and their threat to the integrity of customs agents. Here, by contrast, the impetus for BN's program was its overriding concern for the public safety—an objective that has implications for a broad class of employers unaffected by the concerns in *Von Raab*.

not on a constitutional plane but rather in the law of the private workplace and its employment relationships—which in the case of the railroad industry is governed by the Railway Labor Act.

For these reasons, neither *Von Raab* nor *Burnley* can provide answers to the legal questions that will govern private sector drug testing. Any decision in those cases will leave unanswered pressing questions concerning not only the reconciliation of rail and air carriers' safety obligations with the mandates of the Railway Labor Act, but also the ability of private employers generally to adopt drug-testing programs.[39]

Those questions will go unanswered even if this Court grants certiorari in *Burnley*. As the Solicitor General has pointed out in proposing that the Court review *Von Raab* and *Burnley* in tandem, those two cases "present the same ultimate legal question—whether the Fourth Amendment requires a showing of particularized suspicion before the government may engage in employee alcohol and drug testing." *Burnley* Petition for Certiorari at 14. The distinctions between the two cases go to "differences in the balancing process required to determine whether the programs are 'reasonable' within the meaning of the Fourth Amendment," *id.* at 18, rather than to the fundamentally different labor law questions that lie at the heart of this case. Thus, although this case and *Burnley* both involve the special public safety concerns that attend railroad operations, it is this case that presents the opportunity to address the broad, important issues that arise when such measures are im-

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[39] There are also important differences in the structure of the drug testing program here and in *Von Raab*. *Von Raab* involves blanket testing of all employees seeking promotion to certain positions, regardless whether the employee has shown any indicia of drug or alcohol use. By contrast, under the BN program, employees involved in an accident are tested only if the accident is caused by human error and only if the employees were in a position to contribute to the events that led to the accident. *See supra* at 8.

plemented in the context of the collective bargaining relationship.[40]

In sum, this case raises critical private sector employment issues on which guidance cannot be provided in either *Von Raab* or *Burnley*. The existing intercircuit conflict, the widespread safety problems caused by employee drug use in the private workplace, and, particularly, the grave public safety threat to rail and air transportation, all call for independent review of this case.

CONCLUSION

For each of the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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[40] As a practical matter, a decision in this case upholding the ability of the railroads to develop and implement their own drug testing programs would essentially render academic the portion of the FRA regulations at issue in *Burnley* that merely authorizes, but does not mandate, employee drug testing. *See* App. at 107a-11a.